

# **Access to Knowledge in Canada: A Report from Internet Archive Canada**

Lila Bailey<sup>1</sup>, Copyright Counsel for the Internet Archive Canada  
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## **Introduction**

Canada has made great strides towards increasing access to human knowledge in recent years. Internet Archive Canada believes that now is an opportune time to take advantage of recent legal and political developments to help further expand digital access to knowledge in Canada. This report documents the current legal, political, and cultural landscape for digitization projects in Canada and provides several recommendations for achieving this goal.

## **Update on Internet Archive Canada Activities**

Internet Archive Canada (“IAC”) is a sister organization of the US-based nonprofit digital library, the Internet Archive, whose mission is to provide access to all human knowledge. To date, IAC has digitized more than 530,000 books, microreproductions, archival fonds, and maps. Libraries and institutions that have collaborated with, financially supported, and contributed material to IAC stretch across the entire country, from Memorial University in Newfoundland to University of Victoria in British Columbia. Foundational partners included University of Toronto, University of Ottawa, Canadian Research Knowledge Network, and Library and Archives Canada/ Bibliothèque et Archives Canada.

Since the founding of IAC in 2005, support has grown to more than 300 contributing and sponsoring institutions. Much of the material in IAC’s collection is focused on Canadian cultural heritage and historical government publications. This focus on digitizing historical provincial and federal government records has made more than 20,000 publications available to the Canadian public for free.<sup>2</sup> A few of the important titles include: Sessional Papers of Canada, Ontario Bills and Budgets and more than 9,500 publications from the Ontario Ministry of the Environment and Climate Change.<sup>3</sup> Collaboration with the Thomas Fisher Rare Book Library at University of Toronto has also been particularly fruitful. To date, more than 17,000 rare and one-of-a-kind manuscripts and fonds have been carefully digitized.<sup>4</sup>

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<sup>2</sup> Canadian Publications Portal, available at <https://archive.org/details/governmentpublications&tab=about>

<sup>3</sup> Ontario Ministry of the Environment and Climate Change page, available at <https://archive.org/details/omote>

<sup>4</sup> Thomas Fisher Rare Books Library Portal, available at <https://archive.org/details/thomasfisher>

Ontario Council of University Libraries (OCUL) has continued to be an important partner to IAC in pushing the boundaries of digitization and equitable access in Canada. OCUL operates the Accessible Content E-Portal (ACE Portal). This portal provides students in Ontario Universities and Colleges with perceptual disabilities access to a repository of accessible texts in several formats. Through this service model, more than 10,000 titles digitized by IAC are available in the ACE Portal.

These efforts represent a significant contribution to the accessibility of Canadian digital heritage. IAC continues to seek opportunities and partnerships to expand access to knowledge. Several recommendations for additional opportunities are presented in the final section of this report.

## **Recent Changes in the Legal Landscape**

The Canadian copyright landscape has changed dramatically in just the past few years, presenting an opportunity for expanded access to knowledge. 2012 was a vanguard year for user rights in Canadian copyright law. Judicial, legislative and, more recently, international treaty developments have brought further balance into the law, ushering in more opportunities for public access and use of copyright protected works.

### **Judicial Developments**

Historically, the Canadian version of fair dealing—a limitation on the exclusive rights of copyright holders for specific enumerated purposes—was viewed as narrow and risky to rely upon.<sup>5</sup> In 2004, the Canadian Supreme Court established that fair dealing was a substantive user's right that "must not be interpreted restrictively."<sup>6</sup> In this case, *CCH Canadian Ltd. v. Law Society of Upper Canada*, the Court found that it was fair dealing for the Great Library of Canada to make photocopies of court decisions on behalf of attorneys.

The CCH Court provided guidance on how to assess fair dealing in Canada, using a two-step test. The first step is to determine whether the proposed dealing meets with a permitted purpose—at the time, only research and private study were allowed.<sup>7</sup> This step is a low threshold. The second step is to determine whether the dealing is fair. The Supreme Court identified six fairness factors to be considered: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair.<sup>8</sup> If a particular use of a copyrighted work is fair dealing, then it is not considered an infringement of copyright.

In 2012, the Supreme Court issued five decisions about copyright law in a single day, explaining and cementing the broad scope of fair dealing in Canada. These cases

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<sup>5</sup> Coombe, Rosemary J. and Wershler, Darren and Zeilinger, Martin, *Introducing Dynamic Fair Dealing: Creating Canadian Digital Culture* (2014). In Rosemary J. Coombe, Darren Wershler, and Martin Zeilinger, eds., *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University Of Toronto Press, 2014), p. 9. Available at SSRN: <http://ssrn.com/abstract=2644443>

<sup>6</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 at para 48 (2004).

<sup>7</sup> As discussed further below, the Copyright Modernization Act added education, parody and satire to the list of permissible dealings in 2012.

<sup>8</sup> *Id.*

reiterate the *CCH* decision's "large and liberal" interpretation of fair dealing to ensure that user rights are not "unduly constrained."<sup>9</sup> For example, in *Alberta v. Access Copyright*, the Supreme Court held that is fair dealing for teachers to copy short excerpts of copyrighted works for students in their classes. The Court found that such copying was done for the acceptable purpose of research and private study because, as a user right, the relevant perspective from which to consider the purpose was the user/student whose research and private study was furthered by the teacher's copying. The court also held that the "amount of the dealing" factor should not be assessed in the aggregate. Instead, the court must look at the amount of the work in proportion to the length of the whole works. This decision called into question the license agreements that Access Copyright had entered into with Canadian educational institutions and universities, as discussed further below.

In *SOCAN v. Bell Canada*, the Supreme Court reaffirmed many of the same principles in the *Access Copyright* case. Here, the Court held that a commercial platform allowing users to stream 30-second preview clips of musical works before they decided whether to purchase the work was also considered fair dealing for the purpose of research. The Court reiterated that the purpose must be assessed from the perspective of the user and not the commercial entity that was trying to sell the music.

In each of these cases, the Supreme Court of Canada acknowledged fair dealing as the exercise of users' rights that must be broadly interpreted.

### **Legislative Developments**

In the same year, 2012, the Conservative government of Canada passed the Copyright Modernization Act (CMA). The CMA added several important user-oriented provisions, including the addition of education, parody, and satire as acceptable fair dealing purposes.<sup>10</sup> Taken together with the recent Supreme Court decisions discussed above, Canadian law now allows quite a bit more flexibility in using copyrighted works without permission.

The CMA also expanded the use rights of libraries, museums, and archives.<sup>11</sup> For example, the law now allows libraries, museums, and archives to format shift a work in its permanent collection if the original is in a format that is obsolete or the technology required to use the original is unavailable or is becoming unavailable. Further, libraries, museums, and archives can distribute certain materials digitally, provided that they take certain measures to protect the copyright owner's rights. There is a similar allowance for unpublished works deposited in archives. The CMA also allows the use of publicly accessible online materials for educational purposes, provided that the source and author are attributed, and unless the works are protected by "digital locks."

Several of the other provisions of the CMA also allow private individuals to do more with copyright protected works without legal liability. For example, the CMA created the so-called "YouTube exception" which allows for non-commercial sharing of user-generated

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<sup>9</sup> *Id.* at para 51.

<sup>10</sup> Copyright Modernization Act ("CMA"), SC 2012, s. 29, available at [http://laws-lois.justice.gc.ca/eng/annualstatutes/2012\\_20/FullText.html](http://laws-lois.justice.gc.ca/eng/annualstatutes/2012_20/FullText.html)

<sup>11</sup> CMA, s. 30.1 to 30.21

content that contains copyrighted material.<sup>12</sup> The provision is designed to permit activity that many ordinary Internet users engage in regularly, such as creating mashups, or using a popular song in the background of a personal home video. This provision is subject to conditions (i.e., identification of the source and author, legality of the original work or the copy used, and absence of a substantial adverse effect on the exploitation of the original work).

A series of additional provisions protect consumers from liability for other “ordinary activities that are commonly accepted,” but which had previously remained illegal under Canadian copyright law.<sup>13</sup> For example, the CMA now permits “reproduction for private purposes” or format shifting of personal copies of works, such as transferring a song from CD to an MP3 player.<sup>14</sup> Similarly, the CMA permits “time shifting” of copyrighted materials for later listening, reading or viewing.<sup>15</sup> Finally, the amendments permit individuals to make backup copies of copyrighted works, provided that, among other things, the individual does not give any of the reproductions away to others.<sup>16</sup> However, each of these expansions of user-rights to permit format-shifting, time-shifting, and the creation of backup copies are all subject to the condition that the creation of the reproduction not circumvent a “technological protection measure.” As such, they may not be as user-friendly in practice as they may appear on paper.

The CMA also revised the statutory damages provisions in a user-friendly manner. The law now distinguishes between commercial from non-commercial infringements for the purposes of statutory damages awards.<sup>17</sup> Commercial infringement awards remain the same as before: the court may order up to \$20,000 in damages per work that is infringed. However, where the “infringements are for non-commercial purposes”, the court may order between \$100 and \$5,000 in damages “with respect to all infringements involved in the proceedings for all works.”<sup>18</sup> In other words, statutory damages in a proceeding for non-commercial infringement are now limited to \$5,000, no matter how many works were infringed. Furthermore, in exercising its discretion to award statutory damages for non-commercial infringements, the court is to consider “the need for an award [of damages] to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.”<sup>19</sup>

### **International Treaty Developments**

Another important development in Canadian copyright law is the country’s decision to sign on to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.<sup>20</sup> This move will allow the Treaty to go into effect on September 30, 2016 in the nations where it has been ratified,

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<sup>12</sup> CMA, s. 29.21.

<sup>13</sup> House of Commons Debates, 41st Parl, 1st Sess, No 141 (15 June 2012) at 1005 (Christian Paradis, Conservative Party of Canada).

<sup>14</sup> CMA, s. 29.22(1).

<sup>15</sup> CMA, s. 29.23(1).

<sup>16</sup> CMA, s. 29.24(1).

<sup>17</sup> CMA, s. 38.1(1).

<sup>18</sup> CMA, s. 38.1(1)(b).

<sup>19</sup> CMA, s. 38.1(5).

<sup>20</sup> See WIPO website: <http://www.wipo.int/treaties/en/ip/marrakesh/>

so that print-disabled and visually impaired people can more fully and actively participate in global society.

The goal of the Marrakesh Treaty is to help to end the “book famine” faced by people who are blind, visually impaired, or otherwise print disabled. Currently only 1% to 7% of the world’s published books ever become available in accessible formats. This is partly due to barriers to access created by copyright laws—something the Treaty helps to remove.

The Marrakesh Treaty removes copyright law barriers in two ways. First, it requires ratifying nations to have an exception in their domestic copyright laws for the blind, visually impaired, and their organizations to make books and other print resources available in accessible formats, such as Braille, large print, or audio versions, without needing permission from the copyright holder. Second, the Treaty allows for the exchange of accessible versions of books and other copyrighted works across borders, again without copyright holder permission. This will help to avoid the duplication of efforts across different countries, and will allow those with larger collections of accessible books to share them with visually impaired people in countries with fewer resources.

Internet Archive Canada has been working on accessibility projects, and has digitized more than 10,000 texts in partnership with the Accessible Content E-Portal.<sup>21</sup> To date, this material has only been available to students and scholars within Ontario’s university system. Joining the Marrakesh Treaty now makes it possible for accessible versions of works to be shared more broadly within Canada, and with the other countries who have ratified the treaty.<sup>22</sup>

### **Canadian Approaches to Increasing Access to Knowledge**

In the wake of these legal developments, many educational institutions have developed reasonable fair dealing guidelines which provide educators with a set of criteria for determining whether a particular instance of copying requires permission, or whether it is protected by fair dealing. For example, the University of Toronto’s Fair Dealing Guidelines provide a step-by-step analysis of whether a given use of a copyright protected work may be fair dealing, as well as a few more specific guidelines about what constitutes fair dealing.<sup>23</sup>

Further, many universities, colleges, and K-12 schools have opted out of the Access Copyright<sup>24</sup> license. Legal scholars agreed that in many instances, the Access Copyright license was simply unnecessary because the uses were fair dealing.<sup>25</sup>

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<sup>21</sup> See Scholar’s Portal Website, available at: <http://guides.scholarsportal.info/aceportal>

<sup>22</sup> The first 20 countries to ratify or accede to the Marrakesh Treaty were: India, El Salvador, United Arab Emirates, Mali, Uruguay, Paraguay, Singapore, Argentina, Mexico, Mongolia, Republic of Korea, Australia, Brazil, Peru, Democratic People’s Republic of Korea, Israel, Chile, Ecuador, Guatemala, and Canada.

<sup>23</sup> University of Toronto Fair Dealing Guidelines, available at: <http://www.provost.utoronto.ca/Assets/Provost+Digital+Assets/26.pdf>

<sup>24</sup> Access Copyright is a Canadian copyright collective that collects revenues from Canadian libraries, museums, archives, and educational institutions pursuant to license agreements.

<sup>25</sup> Geist, Michael, “Why Universities Should Not Sign the Access Copyright – AUCC Model License,” available at <http://www.michaelgeist.ca/2012/05/access-copyright-model-licence/>

Along with issuing the fair dealing guidelines, the University of Toronto Library has also developed full-text digital collections, primarily consisting of public domain materials.<sup>26</sup> These special collections contain a wide variety of items, including over 200,000 books, over 600 archived versions of local government websites, Canadian pamphlets and broadsides, and a fine art repository among many other materials. Similarly, the University of Alberta has developed an open access digital portal called Peel's Prairie Provinces – a collection containing both an online bibliography of books, pamphlets and other materials related to the settlement and development of the Canadian West, as well as a searchable full-text collection of digital version of many of these materials.<sup>27</sup> The portal allows access to a diverse collection that includes approximately 7,500 digitized books, over 66,000 newspaper issues, 16,000 postcards and 1,000 maps. Canadiana is another group that has helped to advance access to knowledge in Canada.<sup>28</sup> Initially created by Canadian Universities in 1978 to microform National Library collections, Canadiana has more recently worked to digitize Canadian heritage with a focus mainly on public domain printed materials.

Simon Fraser University Library developed a “risk management” approach to making modern works available in certain special circumstances, when permission is not possible to obtain and fair dealing does not apply.<sup>29</sup> In such cases, SFU uses a risk management approach that seeks to minimize the likelihood of a dispute over digitized material and minimizing possible negative outcomes in the event of any such dispute. The risk assessment categorizes materials as being low-risk or high-risk by taking into account issues such as copyright ownership, the type of material, the relationship of the rights holder to SFU, the rights holder's history of copyright defense, moral rights, any relevant exceptions in the CMA, and the importance of the material to the digitization project. If materials are determined to be low-risk, SFU will digitize them without the authorization of the copyright holder. SFU will only digitize high-risk materials with the permission of the copyright holder.

Using this method, SFU has digitized portions of its special collections, including images, photographs, printed materials, postcards, stamps, editorial cartoons, and other ephemera.<sup>30</sup> These materials are organized and presented as part of special collections on topics such as the immigrant experience, oral histories, indigenous materials, and activism and social movements. SFU is prepared to respond to a rights holder's request for material to be removed according to its Takedown Protocol.

The Dalhousie University Archives has digitized and made available a significant portion of the personal archives of Elisabeth Mann Borgese following a similar risk management strategy.<sup>31</sup> The collection documents Mann Borgese's significant contributions to international oceans policy, her teaching and research activities, and her personal life.

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<sup>26</sup> University of Toronto Libraries Local Digital Special Collections, available at: <https://oneresearch.library.utoronto.ca/digital-collections>

<sup>27</sup> Peel's Prairie Provinces, available at: <http://peel.library.ualberta.ca/aboutsite.html>

<sup>28</sup> Canadiana's online collections are available at <http://www.canadiana.ca/en/collections>

<sup>29</sup> Risk Management Copyright Policy Framework for SFU Library Digitization Projects, available at: <http://www.lib.sfu.ca/help/academic-integrity/copyright/law-policy#risk-management-copyright-policy-framework-for-sfu-library-digitization-projects>

<sup>30</sup> SFU Digitized Collections, available at: <http://digital.lib.sfu.ca/>

<sup>31</sup> Dalhousie University Elisabeth Mann Borgese Fonds, available at: <http://findingaids.library.dal.ca/elisabeth-mann-borgese-fonds>

Digitized materials include the administrative records of the International Centre for Ocean Development and the International Ocean Institute, publications and speeches, and personal records.

The above are just a few examples of Canadian efforts to bring analog materials into digital form to allow increased access to knowledge. Many more such projects can be found via the Canadian National Digital Heritage Index (CNDHI).<sup>32</sup> Supported by funding from Library and Archives Canada and the Canadian Research Knowledge Network, CNDHI is designed to increase awareness of, and access to digital heritage collections in Canada, to support the academic research enterprise and to facilitate information sharing within the Canadian documentary heritage community.

These digitization activities have made significant strides towards opening access to human knowledge in Canada, however, to date, these efforts have been piecemeal. In June of 2016, Library and Archives Canada (“LAC”) announced a National Heritage Digitization Strategy in order “to bring Canada’s cultural and scientific heritage into the digital era to ensure that we continue to understand the past and document the present as guides to future action.”<sup>33</sup> The goal of the strategy is to provide a cohesive path toward the digitization of Canadian memory institutions’ collections, thus ensuring the institutions remain relevant in the digital age by making their collections easily accessible. LAC wishes to compliment the current efforts of Canadian memory institutions such as those described above by ensuring that a national plan of action is in place.

## **Barriers**

Despite these significant strides towards increasing access to knowledge, more can be done. Some legal uncertainty remains, undermining some institutions’ willingness to move forward with digitization projects.

One source of legal uncertainty comes from a lawsuit filed by Access Copyright against York University over their decision to opt out of the Access Copyright license agreement and reliance on a fair dealing policy.<sup>34</sup> The case is being heard at the trial level of the Federal Court of Canada this summer. The outcome of this case will likely determine whether relying on fair dealing is a viable strategy for universities. It is likely that the initial court decision will be appealed, so Canadian institutions will have to wait quite a while before this issue is fully resolved.

Another area of legal uncertainty was built in to the structure of the CMA itself. Among the features of the Copyright Modernization Act is a mandatory 5-year review of the regime.<sup>35</sup> This was put in place to force future governments to assess and adjust Canadian intellectual property laws as necessary to ensure that Canada does not fall behind in the digital economy. The first mandated review of the Copyright Act is set to take place next year in 2017, and already some rights holder groups have begun to lobby the government to roll back some of the CMA’s most important user protections.

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<sup>32</sup> Canadian National Digital Heritage Index, available at: <http://cndhi-ipnpc.ca/en/projects/cndhi>

<sup>33</sup> National Heritage Digitization Strategy, available at [http://www.bac-lac.gc.ca/eng/about-us/Documents/6799\\_bibliothequeArchive\\_EN\\_HR.PDF](http://www.bac-lac.gc.ca/eng/about-us/Documents/6799_bibliothequeArchive_EN_HR.PDF)

<sup>34</sup> Geist, Michael, “Access Copyright’s Desperate Declaration of War Against Fair Dealing,” available at: <http://www.michaelgeist.ca/2013/04/ac-lawsuit-v-york/>

<sup>35</sup> CMA, s. 92

As such, some universities and other memory institutions are hesitant to invest in major time and resource intensive digitization projects prior to the review.

Another area of legal uncertainty derives from negotiations over international trade agreements. Although the United States has pulled out of the Trans-Pacific Partnership (TPP)<sup>36</sup>, which raised concerns that Canada would be required to concede some of its own cultural policies, it is unclear what a renegotiated NAFTA could look like in terms of IP requirements and enforcement. In particular, it is possible that the copyright provisions of the TPP, which would require Canada to add 20 years to its copyright term, removing many thousands of works from the public domain, could be imposed via a new NAFTA or bi-lateral agreement between the US and Canada. This uncertainty means that even projects aiming to increase access to public domain materials might be stalled or stopped all together.

An unrelated, but important, barrier to digitization efforts is the general lack of funding for such projects in Canada. For example, the Archival Community Digitization Program (ACDP) was a program administered by Canadian Council of Archives in cooperation with Library and Archives Canada until funding was cut in 2010.<sup>37</sup> New funding has recently become available under the Documentary Heritage Communities Program for the year 2016; however, there do not appear to be many sources of private or philanthropic funding for digitization projects in Canada limiting the number and scope of such efforts.<sup>38</sup>

## **Recommendations**

Based on the summary of legal and cultural developments in the past few years, there are several areas in which IAC may be able to expand its efforts in increasing access to knowledge in Canada.

1. Build a distinct physical and digital presence in Canada.

The IAC should invest in servers located within Canada. This would clarify that materials digitized and collected by IAC are under Canadian legal jurisdiction. For similar reasons, IAC should register a .ca domain name. For example, “internetarchive.ca” is currently available. The question of whether access to Canadian materials should be restricted in any way, for example to those users with Canadian IP addresses, could be determined on a case-by-case basis along with partners.

2. Invest even more deeply in creating accessible format copies of modern works and partner with groups in Canada and in treaty nations to share accessible works with the blind and visually impaired.

IAC has already developed partnerships to make accessible format materials available. Canada’s joining of the Marrakesh Treaty should encourage IAC to make additional

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<sup>36</sup> Morrow, Adrian, “Trump Withdraws From TPP, But Offers Canada Hope On NAFTA,” The Globe and Mail, Jan. 23, 2017, available at: <http://www.theglobeandmail.com/news/world/us-politics/trump-to-sign-executive-orders-to-scrap-tpp-overhaul-nafta/article33701019/>

<sup>37</sup> Archives Canada Digitization Projects, available at: <http://archivescanada.ca/VirtualExhibits>

<sup>38</sup> Documentary Heritage Communities Program, available at: <http://www.bac-lac.gc.ca/eng/services/documentary-heritage-communities-program/Pages/dhcp-portal.aspx>



investments and develop additional partnerships to digitize as much analog content as possible and share accessible format copies across borders with other nations that have joined the Treaty.

3. Develop fair-dealing based pilot programs.

Canadian institutions have already begun digitizing and making materials available under Fair Dealing Guidelines. More can clearly be done in this area, including potentially:

- A digital music library that allows users to access 30 second clips to songs for research and private study
  - A database of books that can allow for non-consumptive research and access to short snippets of text
  - Creating a digital lending library of modern books leveraging the software created by the U.S. Internet Archive that permits users to borrow one digital copy of a book at a time
4. Work with institutions on “risk managed” approaches to digitization of special collections of modern copyrighted works

Some Canadian institutions have begun to understand and assess the risks associated with not digitizing their collections. Losing access to materials and therefore being unable to meet the research and teaching needs of faculty and staff are substantial risks for these institutions. In light of this, some Canadian libraries and universities are looking for responsible approaches to digitizing their collections while respecting the concerns of rights holders (for example, by developing a takedown policy). The IAC may be able to partner with such institutions to lead by example and bring a large portion of low-risk modern collections into digital form.

5. IAC should develop a Canadian user generated content video hosting and sharing site.

This recommendation leverages the so-called “YouTube exception” recently passed in the CMA. The law allows for noncommercial sharing of user generated content that incorporates the copyrighted works of others. Since YouTube allows advertising, it is not actually clear that the YouTube exception really applies to content hosted on YouTube. Having an ad-free, nonprofit organization host such materials would make it far easier for Canadians to take advantage of this new law.

6. Develop and leverage existing educational materials and open source software to help Canadians exercise their rights to format and time shift digital content they own.

Although the CMA does not permit users to “give away” any backup copies made, it could be beneficial to raise awareness among the Canadian population of these new rights to ensure that digital content owned by consumers is preserved.

7. Explore partnership opportunities with Library and Archives Canada to help them achieve its National Digital Heritage Strategy.

LAC has announced its intention to maximize cooperative efforts and work with partners to achieve its strategic goals for the digitization of Canadian documentary heritage. IAC can and should be a first class partner in these efforts to bring Canada digital and help the nation to become an international leader in access to knowledge.